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In the Supreme Court of the United States

OCTOBER TERM, 1951

No. 281

JAMES MARTIN MACINNIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. 106–115) is as yet unreported.

JURISDICTION

The judgment of the Court of Appeals was entered on July 30, 1951 (R. 116). The petition for a writ of certiorari was filed on August 27, 1951. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1). See also Rules 37 (b) (2) and 45 (a), F. R. Crim. P.

QUESTIONS PRESENTED

1. Whether, having found petitioner guilty of contempt, the trial court lost power to punish him summarily by delaying the formal adjudgment of his guilt until a later date in the trial, and staying execution of the judgment until entry of the verdict.

2. Whether in fixing petitioner's punishment the trial court improperly considered acts of petitioner other than those certified by the court.

3. Whether the petitioner was denied due process by reason of the brief treatment by the court below in its opinion of petitioner's argument that he was not contemptuous.

STATUTE AND RULE INVOLVED

Chapter 21 of Title 18, United States Code, provides in pertinent part:

> § 401. *Power of Court.*
>
> A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—
>
> (1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;
>
> (2) Misbehavior of any of its officers in their official transactions;
>
> (3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

Rule 42, Federal Rules of Criminal Procedure, provides:

> (a) *Summary Disposition.* A criminal contempt may be punished summarily if the judge certifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court. The order of contempt shall recite the facts and shall be signed by the judge and entered of record.
>
> (b) *Disposition Upon Notice and Hearing.* A criminal contempt except as provided in subdivision (a) of this rule shall be prosecuted on notice. The notice shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts constituting the criminal contempt charged and describe it as such. The notice shall be given orally by the judge in open court in the presence of the defendant or, on application of the United States attorney or of an attorney appointed by the court for that purpose, by an order to show cause or an order of arrest. The defendant is entitled to a trial by jury in any case in which an act of Congress so provides. He is entitled to admission to bail as provided in these rules. If the contempt charged involves disrespect to or criticism of a judge, that judge is disqualified from presiding at the trial or hearing except with the defendant's consent. Upon a verdict or finding of guilt the court shall enter an order fixing the punishment.

STATEMENT

Petitioner was counsel for the two codefendants with one Bridges in the trial of the case of *United States* v. *Harry R. Bridges, et al.*[1] (R. 74, 107), which commenced on November 14, 1949, before District Judge George B. Harris in the United States District Court for the Northern District of California. In the course of the trial, in the forenoon of February 1, 1950, Father Paul Meinecke, a Roman Catholic priest, was called as a witness on behalf of the defendants (R. 4–5). From his direct and cross-examinations the following was elicited:

During the decade beginning about 1936–37, he was stationed as an assistant in a parish in the San Francisco diocese, during which period he became interested in the labor movement and was instrumental in organizing the Association of Catholic Trade Unionists in that city (R. 5–7). The organization was designed to familiarize the working people with the principles of trade unionism (R. 8). In the course of his activities in this

[1] The trial was on an indictment, returned against all three defendants, which charged, in substance, that they had conspired to defraud the United States by having the defendant Bridges fraudulently petition for and obtain his naturalization; that Bridges had committed perjury in falsely testifying, under oath, in a naturalization proceeding, that he had never been a member of the Communist Party; and that the other two defendants had aided and abetted him in the commission of such perjury. See *United States* v. *Bridges*, 90 F. Supp. 973 (N. D. Cal.); *United States* v. *Bridges*, 86 F. Supp. 922, 931 (N. D. Cal.).

organization he became acquainted with defendant Bridges (R. 8–9), who, in his opinion, was a man of good character and not a Communist (R. 10–11, 15–19, 22–23). After 10 years in the parish and participation in trade unionist activities in San Francisco, he was transferred, at his own request, to a sparsely populated region of Nevada, where no labor unions were in existence (R. 6, 26–27).

At the conclusion of the direct and cross-examinations, the court interrogated Father Meinecke, who then testified, among other things, that, he was appearing pursuant to a subpoena obtained by the defense; that he arrived in San Francisco from Eureka, Nevada, the previous evening and had dinner at petitioner's home, where he discussed the *Bridges* case with petitioner (R. 31); that he asked petitioner to refresh his memory as to when he first met Bridges, because, since being stationed in Nevada, he rarely saw a newspaper and had no means of computing time—"the years have sort of run together" for him (R. 32–33). Whereupon, the trial judge further inquired: "Have you been recently subjected to medical treatment, Father?" (R. 33), after which the following colloquy ensued (R. 33–34):

> Mr. HALLINAN [counsel for Bridges]. If the Court please, I am going to object to these questions.
>
> Mr. MACINNIS. Let me in.

Mr. HALLINAN. I want to enter a legal objection. Your Honor has seen the Manning Johnsons, the Crouches, the Rosses and everybody get on that stand and we asked whether they were insane or not. I object to your Honor's question. I object to that last question and assign that as misconduct, and I ask that the jury be instructed to ignore the implication of the question.

The COURT. There is no occasion for any admonition to the jury. Mr. MacInnis invited it.

Mr. MACINNIS. I never heard of such a question.

The COURT. Mr. MacInnis invited me to ask the question.

Mr. MACINNIS. Your Honor refused to do that and I asked a question.

The COURT. I have the greatest respect for men of the cloth, as we all have.

Mr. MACINNIS. You are demonstrating it.

The COURT. There is no impropriety in my questioning.

Mr. MACINNIS. I say there is.

The COURT. He asserted his present memory is not good. I asked him whether or not his recollection was good while he was here years ago. He said yes, it was good years ago. I don't see any reason for the criticism.

Mr. MACINNIS. When one of the prosecution witnesses was on the stand we asked him if he had received medical treatment,

and now you ask a priest who comes here and gives testimony the same question.

The COURT. Ladies and gentlemen—

Mr. MACINNIS. I think you should cite yourself for misconduct.

The COURT. Ladies and gentlemen—

Mr. MACINNIS. I have never heard anything like that. You ought to be ashamed of yourself.

Following this incident, the court recessed for the day, after denying a motion, made by Bridges' counsel, for a mistrial because of the alleged "misconduct" on the part of the court in questioning Father Meinecke (R. 35–40). The following day, February 2, 1950, Father Meinecke was recalled as a witness (R. 40), and upon the conclusion of his testimony (R. 40–70), the court orally adjudged petitioner guilty of contempt of court (R. 100) for his conduct of the preceding day, occurring, as the court found, when petitioner, objecting to the court's interrogation of Father Meinecke, addressed the court as follows: "I think you should cite yourself for misconduct. I have never heard anything like that. You ought to be ashamed of yourself" (R. 101). The trial judge then informed petitioner that the Court would file a certificate and order pursuant to Rule 42 of the Rules of Criminal Procedure, but would defer punishment until a later date in the trial (R. 101). Thereafter, the court adjourned until the next day (R. 101).

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Subsequently, on February 28, 1950, while the Bridges trial was still in progress, the trial judge issued an order on contempt (R. 2),[2] together with a certificate specifying the misconduct (R. 3–4),[3] to which was attached the entire testimony of Father Meinecke (R. 4–70).

On April 4, 1950, following the return of the verdict in the principal case (R. 82), the trial judge after adverting to his previous finding that petitioner was guilty of contempt of court, sentenced petitioner to three months' imprisonment (R. 71–73, 87–88).

Upon appeal, the Court of Appeals found that petitioner's conduct constituted contempt of court which the trial court had power to punish sum-

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[2] The order, after adjudging petitioner guilty of contempt as specified in the certificate attached thereto, went on to state in part: "It is ordered that the defendant appear before this Court for sentence upon the termination and conclusion of the trial stages in United States v. Harry Renton Bridges, Henry Schmidt, and J. R. Robertson, No. 32117–H." (R. 2).

[3] The formal contempt certificate filed pursuant to Rule 42 (a), F. R. Crim. P., stated as follows:

"In conformity with Rule 42 (a), Federal Rules of Criminal Procedure, I hereby certify that the conduct for which the defendant is punished for criminal contempt was committed in my presence and was seen and heard by me during a session of the United States District Court for the Northern District of California, Southern Division, under the following circumstances:

"On the morning of Wednesday, February 1, 1950, following the examination by counsel for defendant and counsel for the Government, of the witness, Father Paul Meinecke, the Court had occasion to interrogate the witness. After propounding several questions, the Court asked a proper and

marily (R. 110–113) and affirmed the judgment of conviction (R. 115).

ARGUMENT

1. There is no merit in petitioner's argument that the trial court was without power to punish petitioner summarily for contempt under the circumstances of this case. It has been repeatedly held that a court may consistently with due process punish summarily a person for contempt committed in the presence of the court to preserve the dignity of the court and the respect by the public for its orders and judgments. Rule 42 (a), F. R. Crim. P. *Ex parte Terry,* 128 U. S. 289; *Hallinan* v. *United States,* 182 F. 2d 880 (C. A. 9), certiorari denied, 341 U. S. 952; *United States* v.

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pertinent question, directed toward the physical well-being of the witness, to wit: Q. Have you been recently subject to medical treatment, Father?

"Following such question, Mr. MacInnis jumped to his feet, participated in a critical remonstrance of the Court, at the conclusion of which he stated to the Court in a belligerent manner in the presence of the jury, to wit:

"Mr. MacInnis. I think you should cite yourself for misconduct.

"The Court. Ladies and gentlemen—

"Mr. MacInnis. I have never heard anything like that. You ought to be ashamed of yourself.

"The entire record of the testimony of Father Paul Meinecke, designated Exhibit A, is attached hereto, and is made a part of this Certificate.

"Certified this 28th day of February, 1950, at San Francisco, California.

"(S) George B. Harris,
United States District Judge."

Sacher, 182 F. 2d 416 (C. A. 2), certiorari denied, 341 U. S. 952.

The court's action was in conformance with Rule 42 (a), F. R. Crim. P. Petitioner contends that because the court did not punish him immediately for his insolent and contemptuous language, the court lost jurisdiction and was without power to punish him summarily (Pet. 9–27). Neither the language of Rule 42 (a) nor its purpose as described in the Advisory Committee's note to the rule support this contention. Rule 42 (a), *supra,* p. 3, provides that the court may punish summarily for contempt committed in its presence and makes no mention at all as to when this punishment must take place. The note of the Advisory Committee describes the purpose of Rule 42 (a) to be a restatement of existing law and cites *Ex parte Terry,* 128 U. S. 289. In that case during the reading by the Court of Appeals of an opinion in a case before it, Terry assaulted a marshal who was obeying the court's order to remove Terry's wife from the court room. While Terry was out of the court room, he was adjudged in contempt and sentenced later that same day, but *after* the case during which the contempt had occurred had come to an end. The summary punishment was sustained, although Terry was not in the court room at the time, and punishment could not serve an immediate purpose of preventing disruption of the case before the court.

The *Terry* case thus makes it clear that the basis of the rule permitting summary punishment cannot be solely the prevention of the obstruction caused by the contempt in the case in which the contempt occurs. As Judge Frank pointed out in *United States* v. *Sacher*, 182 F. 2d 416, 456 (C. A. 2):

> * * * summary punishment necessarily has none but a future effect, for always that open-court obstruction or interruption of the court's business which justifies such punishment has, in the nature of things, already happened and cannot be prevented by any sort of punishment. No punishment, summary or otherwise, will undo the contempt, ever a thing of the past. Therefore, the exceptional power to punish summarily cannot be founded on the ability to forestall the punished behavior. Summary punishment, then, since its effect is wholly prospective, must be justified solely by the fact that it will tend to prevent future misconduct—either (1) in the future course of the same case or (2) in other future cases.

The essence of the power to punish summarily consists in the fact that the misbehavior occurred in the very presence of the court. It is the personal witnessing by the court of the contemptuous conduct which gives rise to the summary jurisdiction. That jurisdiction attaches at the instant the contempt is committed, and reasonable delay in imposing punishment does not deprive the

court of the power to proceed summarily. This Court made that point clear when it said, in the *Terry* case, *supra,* 128 U. S. at 311:

> * * * Jurisdiction of the person of the petitioner attached instantly upon the contempt being committed in the presence of the court. That jurisdiction was neither surrendered nor lost by delay on the part of the Circuit Court in exercising its power to proceed, without notice and proof, and upon its own view of what occurred, to immediate punishment. * * *[4]

The courts have consistently held that the power to punish summarily is not restricted to immediate punishment for contempt, but that future summary action may be taken in cases where the contemptuous conduct occurred in the presence of the court. *Hallinan* v. *United States,* 182 F. 2d 880, 887 (C. A. 9), certiorari denied, 341 U. S. 952; *United States* v. *Sacher,* 182 F.

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[4] There is language in the *Terry* case which seemingly leaves open the question of future punishment (p. 314). But it is submitted that the question left open was not future punishment, but future punishment without the presence of the contemnor before the court. The specific words in the *Terry* case were:

"Whether the Circuit Court would have had the power at a subsequent term, or at a subsequent day of the same term, to order his arrest and punishment for the contempt, *without first causing him to be brought into its presence* * * * is a question not necessary to be considered on the present hearing." [Italics ours.]

Here petitioner was present at the imposition of sentence and was given an opportunity to be heard (R. 88).

2d 416, 429 (C. A. 2), certiorari denied, 341 U. S. 955; *In re Maury*, 205 Fed. 626, 631–632 (C. A. 9).

It would seem that in this case the court's actual conduct was fairer to petitioner than would have been immediate punishment. Instead of flaring up in the heat of the atmosphere surrounding the contemptuous statement made by petitioner, Judge Harris waited until the next day before he pronounced petitioner in contempt, and then out of a desire not to disrupt the trial and prejudice petitioner's clients, he put off the punishment until the end of the trial.[5] This course of action could not have prejudiced petitioner. As Judge Frank said in *United States* v. *Sacher, supra* (p. 459):

> This argument puts a premium on hasty action. It means that the judge may act summarily only when he is least likely to be poised and temperate, that only then

[5] It is clear from the record that Judge Harris was thinking of the interests of petitioner's clients when he delayed petitioner's punishment. Earlier in the same case, Mr. Hallinan, counsel for Harry Bridges, and colleague of petitioner was pronounced by Judge Harris in contempt, but on the request of Mr. Bridges, Judge Harris postponed punishment until the end of the trial (R. 83). It was in the light of this experience that Judge Harris made his determination in the case of petitioner's contempt. He showed an equal desire here as he had in Hallinan's case to protect the interests of the defendants on trial, and accordingly postponed punishment of petitioner in order to assure petitioner's clients the protection of the continued services of their counsel.

> may he act without a hearing. Why such instant action is fairness or due process—adequately protective of the accused—and postponed action is not, remains unexplained by proponents of this contention.

Cooke v. *United States,* 267 U. S. 517, and *In re Oliver,* 333 U. S. 257, relied on by petitioner, are not in point since they involved contempt out of the presence of the court, and therefore not within Rule 42 (a). The dicta in these two cases relevant to contempt committed in the presence of the court is in support of *Ex parte Terry, supra,* and the use of the word "immediate" in these cases must be construed to include the kind of "immediate" punishment which was involved in the *Terry* case—punishment after the termination of the case in which the contempt occurred. The recent decisions of the Courts of Appeals on this issue are thus not in conflict, but are in accord with the dicta in the *Oliver* and *Cook* cases.

2. Before sentencing petitioner and his co-counsel Hallinan for contempt, the trial judge remarked that their behavior showed that they had "embarked upon a course of conduct designed and calculated to contemptuously provoke the Court in the hope that such provocation would lead the Court to commit error or plunge the case into a mistrial" (R. 82). He subsequently referred to the fact that petitioner had been regularly adjudged guilty of contempt (R. 87) and said (R. 87–88):

> Although, in my opinion, Mr. MacInnis' contemptuous conduct was just as studied and flagrant as that of Mr. Hallinan, nevertheless I feel he is entitled to a lesser sentence, for the reason that he appears to have been, to some extent at least, inspired by his senior colleague, Mr. Hallinan.

It was not improper, as contended by petitioner (Pet. 28), for the trial court to consider petitioner's entire course of conduct leading up to the specific act of contempt. As the Court of Appeals said (R. 114–115):

> It was the proper function of the presiding judge to consider whether the conduct of counsel derived from overzealousness in the defense of his client or from a deliberate play to disrupt the proceedings. *United States* v. *Sacher, supra.* The court's remarks addressed to counsel after the verdict had been returned admirably show the poise of the judge and that the sentence was based upon the statements contained in the certificate in their frame of circumstance. The court's reference to the general conduct of counsel throughout the trial does not indicate that either the judgment of contempt or the punishment therefor rests upon such conduct. The court found appellant's statements to be contemptuous and measured the punishment to fit the offense. The court's remarks constitute an explanation of the fact that counsel's conduct other than the

contemptuous remarks was such that the contemptuous statements would not be condoned.

Petitioner's course of behavior during the trial occurred in Judge Harris' presence, was observed by him, gave emphasis to the intent with which petitioner committed his contempt and was properly considered by the court to place petitioner's contempt in its setting and to determine its true character. *Fisher* v. *Pace,* 336 U. S. 155, 161. As pointed out in the *Fisher* case, the transcript of the record cannot convey the complete picture of the court room scene. Missing are such "elements of misbehavior as expression, manner of speaking, bearing, and attitude" of the petitioner. The occurrence "must be viewed as a unit in order to appraise properly the misconduct" of the petitioner.

The contempt statute, 18 U. S. C. 401, leaves the extent of punishment to the sound discretion of the trial court. It has been consistently held that the trial judge is in the best position to fix a proper penalty for contempt in his presence and that the sentence imposed by him will not be reviewed or disturbed in the absence of a showing of gross and palpable abuse of discretion. *Ex parte Terry,* 128 U. S. 289, 309–310; *Hallinan* v. *United States,* 182 F. 2d 880, 887–888 (C. A. 9); *In re Maury,* 205 Fed. 626, 632 (C. A. 9). We submit that there was no abuse of discretion in this case.

3. Finally, petitioner argues that the court below denied him due process by ignoring his so-called "factual defense." By his "factual defense," petitioner refers to his argument, on the basis of the record, that he did not act contemptuously. While the court below did not find it necessary to analyze the petitioner's argument in detail, the opinion makes it clear that the court, on examination of the record, found that petitioner's actions were contemptuous (R. 110). It is obvious that petitioner was not denied due process by reason of the fact that the court treated the issue briefly in its opinion.

CONCLUSION

The judgment below is correct and there is no conflict of decisions. We therefore respectfully submit that the petition for a writ of certiorari should be denied.

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